Filed 6/9/09 Mercury Plastics v. Rabchev CA2/2

NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION TWO

MERCURY PLASTICS, INC., Plaintiff and Respondent, v. LUBEN RABCHEV et al., Defendants and Appellants.	B207264 (Los Angeles County Super. Ct. No. BC299877)

APPEAL from a judgment of the Superior Court of Los Angeles County. Robert H. O'Brien, Judge. Affirmed in part; reversed in part and remanded.

Songstad & Randall, L. Allan Songstad, Jr., and William D. Coffee for Defendants and Appellants.

Law Offices of Debra L. Korduner and Debra L. Korduner for Plaintiff and Respondent.

* * * * * *

A jury found appellants Luben Rabchev (Rabchev), John T. Nakaoka (Nakaoka) and Infinity Packaging, Inc. (Infinity) liable for breaching fiduciary duties owed to respondent Mercury Plastics, Inc. (Mercury). On appeal, appellants contend the verdict was not supported by substantial evidence and was the result of a prejudicially erroneous jury instruction. We affirm the jury's finding of liability against Rabchev and Nakaoka, but reverse the judgment against Infinity. We also reverse the jury's award of damages and remand the matter for a new trial on the amount of actual and punitive damages.

FACTUAL AND PROCEDURAL BACKGROUND

Mercury manufactures and sells flexible plastic packaging to a variety of customers, with its largest customers in the fresh produce industry. Rabchev became Mercury's president and a director in 1987 when the company was formed and held those positions for the next 16 years. He headed Mercury's sales team and was involved in all aspects of Mercury's operations. In 1997, Mercury opened an office in Salinas, California to better serve its two largest customers, Tanimura & Antle (T&A) and Vegetable Growers Supply (VGS). Rabchev's daughter, Albena Leon (Leon), managed the Salinas office and serviced these accounts and others, including Dole Vegetables, Fresh Express and Taylor Farms. Dessislava Reynolds (Reynolds), Radoslav Sertov (Sertov), and Ellwyn Markov (Markov) were hired at Rabchev's request and assisted Leon with the Salinas accounts. Reynolds worked nearly full time on the T&A account and attended weekly meetings at T&A. In 1999, Mercury opened an office in Bakersfield to better serve its largest agricultural account in the area, Grimmway Farms. Rabchev's niece, Antonia Rabtcheva (Rabtcheva), managed this office and was the only person servicing Grimmway Farms and other accounts in the area.

Rabchev owned 49 percent of Mercury's stock and the remaining 51 percent was owned by the Deutsch family. Rabchev hired Nakaoka and others to assist him in his efforts to sell his Mercury stock to the Deutsches. Rabchev appointed Nakaoka to Mercury's board of directors in March 2003.

On Sunday, July 6, 2003, Rabchev resigned without notice as Mercury's president and as a member of its board of directors by sending a facsimile to the home of Mercury's chief executive officer. His resignation was effective that day. Rabchev admitted at trial that his resignation created a void in senior sales staff management. He also admitted stating at a Mercury board meeting a year earlier that he "feared that changes in senior sales management staff might adversely affect the value of the company." On July 15, 2003, Nakaoka resigned without notice as a member of Mercury's board of directors. On July 21, 2003, Leon, Reynolds, Sertov and Rabtcheva resigned from their employment with Mercury, also without notice. Markov resigned the following day. Rabchev admitted at trial that he was of the opinion that the mass resignations at the same time without notice would hurt Mercury. Mercury did not have employment agreements or covenants not to compete with its officers, directors or employees.

Infinity was incorporated on July 24, 2003. Infinity sells, but does not manufacture, plastic packaging to customers in the fresh produce industry. Rabchev became the president of Infinity, Nakaoka became its secretary and they both served as directors. Leon, Reynolds, Sertov, Rabtcheva and Markov immediately went to work for Infinity and began servicing the same accounts they had worked on at Mercury. Reynolds admitted at trial that she had worked on the T&A account since the day she left Mercury, which eventually filed for bankruptcy protection.

Mercury filed this lawsuit on July 29, 2003, just days after the resignations. In December 2003, Mercury filed a first amended complaint against Rabchev, Nakaoka, Infinity and the other employees who had resigned, alleging claims for misappropriation of trade secrets, interference with prospective economic advantage, fraud, breach of fiduciary duty and conspiracy. The trial court granted the defendants' motion for summary judgment and Mercury appealed. In an unpublished opinion, we reversed the judgment, finding that Mercury had created triable issues of fact on its claims, and remanded the matter. Mercury then filed its second amended complaint against the same

defendants and others, alleging claims for interference with economic advantage, misappropriation of trade secrets, breach of fiduciary duty and conspiracy.

The case proceeded to jury trial in January 2008, and the reporter's transcript of the proceedings is more than 2,000 pages. Following the presentation of Mercury's evidence, the trial court granted the defendants' motion for nonsuit as to the first cause of action for interference with economic advantage and the second cause of action for misappropriation of trade secrets. This ruling had the effect of dismissing from the case all defendants except Rabchev, Nakaoka and Infinity, and left only the third cause of action for breach of fiduciary duty against Rabchev and Nakaoka, and the fourth cause of action for conspiracy against Rabchev, Nakaoka and Infinity.[1]

By special verdict, the jury unanimously found that Rabchev and Nakaoka breached their fiduciary duties to Mercury and that Rabchev, Nakaoka and Infinity were "guilty of Conspiracy amongst themselves regarding the breach of fiduciary duty." The jury found that damages were caused by the breach of fiduciary duty in the amount of $16,457,866. In a separate special verdict, the jury awarded Mercury punitive damages of $250,000 against Rabchev and $25,000 against Nakaoka. Appellants' motions for a new trial and for judgment notwithstanding the verdict were denied. This appeal followed.

DISCUSSION

I. ISSUES AND STANDARDS OF REVIEW.

Appellants contend there was insufficient evidence to support the jury's findings of breach of fiduciary and conspiracy and to support the award of damages. Appellants also contend the jury instruction on the elements for breach of fiduciary duty was erroneous as a matter of law and so prejudicial as to constitute reversible error.

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[1] Rabchev sued the Deutsches for breach of fiduciary duty and the jury found in favor of the Deutsches on this claim.

We review a jury's findings of fact under the deferential substantial evidence standard. (*Bickel v. City of Piedmont* (1997) 16 Cal.4th 1040, 1053.) Under this standard, "'"the power of an appellate court begins and ends with a determination as to whether there is any substantial evidence, contradicted or uncontradicted," to support the findings below.'" (*Ibid*.) In making this determination, we must view the evidence in the light most favorable to the prevailing party, giving it the benefit of every reasonable inference and resolving all conflicts in its favor. (*Ibid*.) "Inferences may constitute substantial evidence, but they must be the product of logic and reason. Speculation or conjecture alone is not substantial evidence." (*Roddenberry v. Roddenberry* (1996) 44 Cal.App.4th 634, 651; *Kuhn v. Department of General Services* (1994) 22 Cal.App.4th 1627, 1633.) We are not at liberty to reweigh the evidence or judge the credibility of witnesses. (*Electronic Equipment Express, Inc. v. Donald H. Seiler & Co.* (1981) 122 Cal.App.3d 834, 849.)

"'A party who challenges the sufficiency of the evidence to support a particular finding must *summarize the evidence* on that point, *favorable and unfavorable*, and *show how and why it is insufficient.*'" (*Huong Que, Inc. v. Luu* (2007) 150 Cal.App.4th 400, 409.) This burden is a "'daunting'" one. (*Ibid*.) Appellants who fail to set forth in their brief all the material evidence on the point and not merely their own evidence are deemed to have waived their challenge. (*Nwosu v. Uba* (2004) 122 Cal.App.4th 1229, 1246.) Mercury argues that appellants have failed to fairly summarize all the material evidence and urges us to find that appellants have waived their claim that the verdict is not supported by substantial evidence. We are not inclined to do so. While appellants did not set forth as complete a summary of all the material evidence as they should have, they did summarize the evidence favorable to Mercury and state why they believed it was insufficient.

"'[I]n determining whether or not the instructions given are correct, we must assume that the jury might have believed the evidence upon which the instruction favorable to the losing party was predicated, and that if the correct instruction had been

given upon that subject the jury might have rendered a verdict in favor of the losing party.'" (*Henderson v. Harnischfeger Corp.* (1974) 12 Cal.3d 663, 674.)

II. SUBSTANTIAL EVIDENCE SUPPORTS THE JURY'S FINDING OF BREACH OF FIDUCIARY DUTY.

Appellants contend the jury's finding that Rabchev and Nakaoka breached their fiduciary duties to Mercury must be reversed because there was no evidence that they solicited Mercury's employees or customers prior to Rabchev's resignation as an officer and director of Mercury on July 6, 2003 and Nakaoka's resignation as a director of Mercury on July 15, 2003.

Our Supreme Court has set forth the general rules applicable to the duties of corporate officers and directors: "'Corporate officers and directors are not permitted to use their position of trust and confidence to further their private interests. While technically not trustees, they stand in a fiduciary relation to the corporation and its stockholders. A public policy, existing throughout the years, derived from a profound knowledge of human characteristics and motives, has established a rule that demands of a corporate officer or director, peremptorily and inexorably, the most scrupulous observance of his duty, not only affirmatively to protect the interests of the corporation committed to his charge, but also to refrain from doing anything that would work injury to the corporation, or to deprive it of profit or advantage which his skill and ability might properly bring to it, or to enable it to make in the reasonable and lawful exercise of its powers.'" (*Bancroft-Whitney Co. v. Glen* (1966) 64 Cal.2d 327, 345 (*Bancroft-Whitney*).) The Court further stated: "The mere fact that the officer makes preparations to compete before he resigns his office is not sufficient to constitute a breach of duty. It is the nature of his preparations which is significant." (*Id*. at p. 346.) "'Thus, before the end of his employment, he can properly purchase a rival business and upon termination of employment immediately compete. He is not, however, entitled to solicit customers for such rival business before the end of his employment nor can he properly do other

similar acts in direct competition with the employer's business." (*Id*. at p. 346, fn. 10, quoting Comment e of section 393 of the Restatement Second of Agency.)

Mercury concedes that much of the evidence it produced on its claim for breach of fiduciary duty was circumstantial. But circumstantial evidence is not trumped by direct evidence when the direct evidence consists merely of denials of wrongdoing. (*Ajaxo Inc. v. E*Trade Group Inc.* (2005) 135 Cal.App.4th 21, 50.) "A party may rely upon 'reasonable inferences' from the evidence to support a verdict." (*Ibid*.) Mercury presented the following evidence:

Solicitation of Mercury's Employees.

At Rabchev's request, Nakaoka traveled from his home in Washington to meet with Rabtcheva at her home in Bakersfield in March 2003. Nakaoka testified that he discussed with Rabtcheva a business she might form with Leon, and Rabtcheva admitted they may have talked about partnership issues and about her being in business with Leon. Around the same time, Nakaoka prepared a document entitled "Partnership Compatibility," which he provided to Rabtcheva or her husband and on which he added the handwritten notation "non-compete/x mos notice before resignation . . . ." At Rabchev's request, Nakaoka also met with Leon at her home in Salinas on May 20, 2003. The jury could reasonably infer from this oral and documentary evidence that the purpose of these private meetings was to solicit Rabtcheva and Leon to work for a new competing venture.

Again at Rabchev's request, Nakaoka arranged a meeting at Rabchev's home with Mercury's independent sales agents, Joe Ross and Scott Keller of Rossmith Packaging, Inc., for June 19, 2003. Nakaoka admitted that he knew at the time that Rossmith Packaging was important to Mercury in terms of its sales, particularly with respect to T&A. At the meeting there was a discussion of Mercury's sales force separating from Mercury and becoming a separate entity. It was agreed at this meeting that a further meeting would be held the following month. On July 1, 2003, Keller, who lived in Chicago, purchased an airline ticket to attend the July meeting, which took place on

July 15 and 16, 2003 at Rabchev's home. Although Nakaoka resigned from Mercury approximately 1.5 hours before this second meeting began, it was a continuation of a plan begun before his resignation. Mercury presented both oral and documentary evidence that at the July 15, 2003 meeting there was a detailed discussion of the new business that would compete with Mercury, including employing the sales force still employed by Mercury and potential customers. On July 16, 2003, Nakaoka prepared a schedule for a further meeting the following month, which included as participants Leon and Rabtcheva, who were still Mercury employees. Again, the jury could have reasonably inferred that Rabchev and Nakaoka had solicited these employees prior to their resignations from Mercury.

The lease for Infinity's office space was signed on July 29, 2003, and Sertov testified at his deposition, which testimony was read to the jury, that he, Leon and Reynolds were looking for an office for Infinity for "about a month, maybe a little bit less." These employees did not resign from Mercury until July 21, 2003, Rabchev was an officer and director of Mercury until July 6, 2003 and Nakaoka a director until July 15, 2003. Here also, the jury could reasonably infer that Rabchev and Nakaoka had solicited these employees prior to resigning from Mercury.

Solicitation of Mercury's Customers.

VGS, one of Mercury's largest customers, placed an order with Infinity on August 7, 2003. VGS's director of purchasing, Fred Adams, testified that although he could not remember exactly, it was approximately a month before the order was placed that Rabchev and Leon approached him about placing an order with Infinity. The jury could make the reasonable inference that Rabchev had solicited VGS prior to his resignation from Mercury.

Mercury also produced copies of Nakaoka's calendar. His calendar entries for May 23–24, 2003 were "Joe Prandini @ LR's [Rabchev's]," that Mr. Prandini was with "Bonipak [Bonita Packaging, which was one of Mercury's major customers]," and listed Mr. Prandini's work and cell phone numbers and work e-mail address. Nakaoka's

calendar for June 2003 shows home and business telephone numbers for "Fred & Marilyn Adams @ VGS." Again, the jury could reasonably infer that Nakaoka had contacted these customers about the new business venture in May and June 2003 prior to resigning from Mercury.

Mercury also produced evidence that Rabchev and Ross received an order for the new company from T&A, one of Mercury's largest customers, on July 19, 2003, just days after the July 15–16 meetings. The order was for products Mercury made for T&A and Ross testified that he considered this order to be something that would potentially hurt Mercury. The jury could have reasonably inferred from this evidence that it was not likely that T&A, which had been a customer of Mercury's for 10 to 15 years and had done a large amount of business with Mercury, had heard about the new company for the first time on July 18, 2003 and had then given it an order which would have otherwise gone to Mercury.

Taken together, the foregoing evidence was sufficient for the jury to find that prior to their resignations from Mercury, Rabchev and Nakaoka solicited Mercury's key sales employees to work at a competing venture and to resign en masse and solicited some of Mercury's key customers, in breach of their fiduciary duties to Mercury. As stated in *Bancroft-Witney, supra*, 64 Cal.2d at page 348, "In arriving at this conclusion we are mindful of the rule that when either one of two inferences may fairly be deduced from the evidence, an appellate court must accept the inference which will be favorable to the judgment." It makes no difference that the evidence might also be contradicted and susceptible to a contrary finding. (*Electronic Equipment Express, Inc. v. Donald H. Seiler & Co., supra,* 122 Cal.App.3d at p. 849.)

Our conclusion is supported by two cases. In *Bancroft-Whitney, supra*, 64 Cal.2d 327, the evidence showed that while still president of the plaintiff company, the defendant assisted his soon-to-be new employer, Matthew Bender & Co., a competitor of the plaintiff, in effecting a raid on the plaintiff's key personnel by providing a list of the key employees and their salaries to the new employer, suggesting salaries to be offered by the new employer and personally soliciting several employees. (*Id*. at pp. 347–348.)

The president and his hand-picked group of employees resigned en masse. (*Id*. at p. 344.) The Supreme Court found that this conduct amounted to a breach of fiduciary duty *as a matter of law*. (*Ibid*.) The Court stated: "We need not decide whether any of these acts would constitute a breach of fiduciary duty, taken alone, since there can be little doubt that, in combination, they show a course of conduct which falls demonstrably short of 'the most scrupulous observance' of an officer's duty to his corporation." (*Id*. at p. 348.)

Similarly, in *GAB Business Services, Inc. v. Lindsey & Newsom Claim Services, Inc.* (2000) 83 Cal.App.4th 409 (*GAB*), the reviewing court found there was ample evidence to support a jury verdict in favor of the plaintiff's breach of fiduciary duty claim where the evidence showed that a former officer "used his insider's knowledge of employee skills and salaries to recruit valued employees away from the corporation he owed a fiduciary duty to, and into jobs with the corporation's competitor." (*Id*. at p. 424.) The court concluded that the officer's conduct was "slightly worse" than that of the president's in *Bancroft-Whitney* because the officer accomplished the solicitation himself, rather than merely facilitating it. (*GAB, supra,* at p. 424.)

We are satisfied that the jury's verdict on the breach of fiduciary duty claim was supported by substantial evidence.

III. THE JURY INSTRUCTION DOES NOT WARRANT REVERSAL OF THE JUDGMENT.

Appellants contend that the jury was erroneously instructed on the elements of breach of fiduciary duty and that such error was so prejudicial as to require reversal of the entire judgment.

The jury was instructed with CACI No. 4102 modified by Mercury as follows:

"Mercury Plastics, Inc. claims that it was harmed by defendants Luben Rabchev's and John T. Nakaoka's breach of the fiduciary duty of loyalty. A corporate officer and a member of a corporation's board of directors owes its corporation undivided loyalty. To establish this claim, Mercury Plastics, Inc. must prove all of the following:

"1. That defendant Luben Rabchev was a corporate officer of Mercury Plastics, Inc. and member of Mercury Plastics, Inc.'s board of directors, and that defendant John T. Nakaoka was a member of Mercury Plastics, Inc.'s board of directors;

"2. That defendants Luben Rabchev and John T. Nakaoka did one or more of the following acts:

"a. Took steps to form defendant Infinity Packaging, Inc. while defendant Luben Rabchev was still an officer and director of Mercury Plastics, Inc. and defendant John T. Nakaoka was still a member of Mercury Plastics, Inc.'s board of directors;

"b. Caused and/or encouraged Albena Leon, Antonia Rabtcheva a/k/a Antonia Rabchev, Dessislava Reynolds, Radoslav Sertov, and Ellwyn Markov to breach the terms of their employment agreements with Mercury Plastics, Inc.;

"c. Solicited Mercury Plastics, Inc.'s customers;

"d. Caused Albena Leon, Antonia Rabtcheva a/k/a Antonia Rabchev, Dessislava Reynolds, and Radoslav Sertov to solicit Mercury Plastics, Inc.'s customers; or

"e. Caused Albena Leon, Antonia Rabtcheva a/k/a Antonia Rabchev, Dessislava Reynolds, and Radoslav Sertov to resign from Mercury Plastics, Inc. at the same time for the purpose of harming Mercury Plastics, Inc.;

"3. That Mercury Plastics, Inc. did not give informed consent to the conduct of defendants Luben Rabchev and John T. Nakaoka;

"4. That Mercury Plastics, Inc. was harmed; and

"5. That the conduct of defendants Luben Rabchev and John T. Nakaoka was a substantial factor in causing Mercury Plastics, Inc.'s harm."

Although appellants assert that "[t]he foregoing instruction, in its entirety, is erroneous and contrary to California law," they only address paragraphs 2 and 3 in their discussion, and we will therefore do likewise. But first, we address Mercury's argument that appellants agreed to the instruction and therefore invited the errors of which they complain.

"The doctrine of invited error bars an appellant from attacking a verdict that resulted from a jury instruction given at the appellant's request." (*Stevens v. Owens-Corning Fiberglas Corp.* (1996) 49 Cal.App.4th 1645, 1653.) Mercury points out that it served the proposed instruction on appellants in July 2007, which was more than five months before the trial, and that at no time did appellants propose an alternate instruction. At the conference on jury instructions held during the trial, there was limited discussion on this instruction in which the only objection made by appellants' counsel was to paragraph 2, subparagraph (a). Mercury claims that at the end of this discussion, appellants' counsel agreed to the entire instruction. From our review of the reporter's transcript of this conference it appears that at most, appellants' counsel agreed to subparagraph (a). Because it cannot clearly be determined that appellants agreed to the instruction in its entirety, we proceed to address their arguments.

Paragraph 2, subparagraph (a): Appellants argue that a finding that Rabchev and Nakaoka took steps to form Infinity prior to their resignations would not be sufficient to establish breach of fiduciary duty. Appellants cite to the language in *Bancroft-Whitney*, *supra*, 64 Cal.2d 327, 346, as noted above, that the mere fact that an officer makes preparations to compete before resigning is not sufficient to constitute a breach of duty. If this were the only statement in the instruction, we would find it to be an incorrect statement of the law. But, as the trial court pointed out, this statement is qualified by paragraph 4, which required the jury also to find that Mercury was *harmed* by the steps Rabchev and Nakaoka took to form Infinity prior to their resignations. Taken together, these paragraphs are a correct statement of the law.

Paragraph 2, subparagraph (b): Appellants argue that a finding that Rabchev and Nakaoka encouraged employees to breach the terms of their employment agreements with Mercury is "totally inapplicable to this case and factually wrong." Appellants are correct. As they point out, Mercury's president, Benjamin Deutsch, testified that Mercury does not have employment agreements with its employees. Mercury counters

that it also produced at trial its employee handbook, which contains "Confidentiality and Nondisclosure" provisions regarding its trade secrets, and acknowledgment forms signed by employees stating that the handbook "sets forth the terms and conditions of my employment as well as the rights, duties, responsibilities and obligations of my employment with the Company." It is not clear if Mercury is arguing, contrary to the testimony of its president, that these documents constitute employment agreements, but, if so, the only provisions Mercury claimed were breached were those relating to its trade secrets. Because the trial court dismissed Mercury's trade secrets claim against all defendants, including the employees listed in this instruction, this part of the jury instruction had no application to the evidence presented at trial.

"An instruction is erroneous if, though abstractly correct as a statement of law, it is not within the issues developed by the evidence or reasonable inferences from the evidence. If it is likely to mislead the jury, the error is prejudicial." (7 Witkin, Cal. Procedure (5th ed. 2008) Trial, § 307, p. 360.) Our Supreme Court has outlined five factors that should be considered in order to measure the likelihood of whether the jury was misled: "(1) the degree of conflict in the evidence on critical issues [citations]; (2) whether respondent's argument to the jury may have contributed to the instruction's misleading effect [citation]; (3) whether the jury requested a rereading of the erroneous instruction [citation] or of related evidence [citation]; (4) the closeness of the jury's verdict [citation]; and (5) the effect of other instructions in remedying the error [citations]." (*LeMons v. Regents of University of California* (1978) 21 Cal.3d 869, 876; *Soule v. General Motors Corp.* (1994) 8 Cal.4th 548, 580–581; *Huffman v. Interstate Brands Corp.* (2004) 121 Cal.App.4th 679, 704.)

Applying these factors here demonstrates that the error was not so prejudicial as to warrant a reversal of the judgment: (1) There was substantial evidence from which the jury could infer that, prior to their resignations from Mercury, Rabchev and Nakaoka solicited employees and customers of Mercury and it is not likely that the jury ignored all of this evidence in favor of finding only that Rabchev and Nakaoka encouraged Mercury's sales force to breach confidentiality and nondisclosure provisions in the

employee handbook; (2) Mercury's counsel presented oral argument pointing out the other evidence to the jury; (3) the jury did not request a second reading of this instruction or other related evidence; (4) the jury unanimously found that Rabchev and Nakaoka breached their fiduciary duties to Mercury; and (5) the remainder of this instruction required the jury to find that Rabchev's and Nakaoka's actions harmed Mercury. Furthermore the jury was correctly instructed with CACI No. 4100 that a corporation's officers and directors have a "duty to act with the utmost good faith in the best interests of its corporation."

Paragraph 2, subparagraphs (c), (d) and (e): Appellants argue that these parts of the instruction "are all in error because they do not reference a time frame for the conduct." In other words, appellants claim the proscribed acts should have included the language found in subparagraph (a), namely, that Rabchev and Nakaoka undertook the specified acts "while defendant Luben Rabchev was still an officer and director of Mercury Plastics, Inc. and defendant John T. Nakaoka was still a member of Mercury Plastics, Inc.'s board of directors."

The instruction given in subparagraphs (c), (d) and (e)—that Rabchev and Nakaoka could be liable for breach of fiduciary duty by soliciting Mercury's customers and employees and causing the employees to resign en masse for the purpose of harming Mercury—are not incorrect statements of the law per se. A corporate fiduciary can certainly be liable to his or her corporation for engaging in such acts. Rather, the instructions are incomplete or too general because they do not include a timeframe for the wrongful conduct. But, as Mercury points out, "when a trial court gives a jury instruction that is legally correct but is "'too general, lacks clarity, or is incomplete'" [citations], a party may challenge the instruction on appeal only if it had asked the trial court to give a clarifying instruction." (*Lund v. San Joaquin Valley Railroad* (2003) 31 Cal.4th 1, 7; *Conservatorship of Gregory* (2000) 80 Cal.App.4th 514, 520; 7 Witkin, Cal. Procedure (5th ed. 2008) Trial, § 260, pp. 313–314.) Appellants failed to do so here.

Appellants seek to avoid application of this rule by relying on Code of Civil Procedure section 647, which declares that "giving an instruction, refusing to give an instruction, or modifying an instruction given" is deemed excepted to. "This statute has been interpreted to mean that when an instruction contains an *incorrect* statement of the law, in contrast to a claim that the instruction is too general or incomplete, the failure to object or propose a correct instruction will not bar a party from raising the error on appeal." (*U.S. Roofing, Inc. v. Credit Alliance Corp.* (1991) 228 Cal.App.3d 1431, 1446–1447 (italics added).) Appellants argue they are not claiming that subparagraphs (c), (d) and (e) of the instruction are too general or incomplete, rather, that they are incorrect statements of the law. But we have concluded that they are not incorrect statements of the law per se, and appellants' efforts to couch them as such does not exempt them from the requirement to ask for a clarifying instruction. Accordingly, we find that appellants have waived on appeal their challenge to subparagraphs (c), (d) and (e).

Paragraph 3: Appellants argue that the concept of informed consent in the context of a breach of fiduciary duty claim applies only when a corporate officer or director usurps the corporation's business opportunity. Appellants cite to *Xum Speegle, Inc. v. Fields* (1963) 216 Cal.App.2d 546, where the plaintiff's officer and director was found liable for breach of fiduciary duty by conducting a competing business while still an officer and director of the plaintiff. Although this case does not use the phrase "informed consent," appellants argue that because there was no evidence presented that they were operating a competing business with Mercury prior to their resignations, such a concept had no application here.

Mercury counters that this language is contained in CACI No. 4102 and that Rabchev used the same language in his own breach of fiduciary duty instruction in his cross-action against the Deutsches. The record shows that appellants' counsel stated at the conference on jury instructions that he was "going to modify our fiduciary duty instruction so it matches the Mercury's fiduciary duty instruction." Under the doctrine of invited error, if instructions are given at the request of the opposing party, the

complaining party cannot attack them if he or she proposed similar instructions. (7 Witkin, Cal. Procedure, *supra*, § 316, p. 369.) Appellants assert that the concept of informed consent was appropriate in the context of Rabchev's cross-complaint. We cannot tell from the record before us if this is so. But even assuming there was no invited error and that including "informed consent" in the instruction was erroneous, we do not find any prejudice.

"Instructional error in a civil case is prejudicial 'where it seems probable' that the error 'prejudicially affected the verdict.'" (*Soule v. General Motors Corp., supra,* 8 Cal.4th 548, 580.) Appellants point to no place in the record where the concept of informed consent was defined to the jury to mean that Rabchev and Nakaoka were operating a competing business with Mercury prior to their resignations from Mercury. In the absence of such a definition being provided, it is not likely that the jury would have so interpreted this language in the manner appellants urge and then have ignored the fact that the evidence did not support appellants' version of the language. It is far more probable that the jury simply interpreted the language as it was written, i.e., that Mercury did not give its informed consent to appellants' actions, which it did not.

IV. THE JUDGMENT AGAINST INFINITY FOR CONSPIRACY TO BREACH A FIDUCIARY DUTY MUST BE REVERSED.

Appellants contend that Infinity cannot be liable for conspiracy to breach a fiduciary duty. We agree for two reasons. First, it is well established that a party cannot be held liable for conspiracy to breach a fiduciary duty if the party does not owe a fiduciary duty to the plaintiff. (*Everest Investors 8 v. Whitehall Real Estate Limited Partnership XI* (2002) 100 Cal.App.4th 1102, 1106–1108 (*Everest*); *1-800 Contacts, Inc. v. Steinberg* (2003) 107 Cal.App.4th 568, 590.) This is so because "[b]y its nature, tort liability arising from a conspiracy presupposes that the conspirator is legally capable of committing the tort—that he owes a duty to the plaintiff recognized by law and is potentially subject to liability for the breach of that duty." (*Everest, supra,* at p. 1106.) Mercury counters that this is not a hard-and-fast rule, citing to the introductory language

in *Everest*: "The question on this appeal is whether a nonfiduciary defendant can be liable for conspiring with a fiduciary defendant to breach the fiduciary's duty to the plaintiff. The answer, in our view, is sometimes yes and sometimes no." (*Id.* at p. 1104.) But the court in *Everest* explained that the nonfiduciary might only be liable when it is an agent or employee of the fiduciary and was acting for its own benefit. (*Ibid.*; cf. *1-800 Contacts, Inc. v. Steinberg*, *supra*, at p. 592 [finding that such an exception is illogical and "effectively swallow up the rule"].) Mercury does not argue that such an exception is applicable here. Because Infinity, a competitor of Mercury's, owed no fiduciary duty to Mercury, we conclude that as a matter of law it could not be held liable for conspiracy to breach fiduciary duties owed by Rabchev and Nakaoka to Mercury.

Second, there is no substantial evidence to support a verdict against Infinity for conspiracy. The evidence showed that Rabchev and Nakaoka resigned from Mercury on July 6, 2003 and July 15, 2003, respectively, and that Infinity was not incorporated until July 24, 2003. Thus, Infinity did not exist prior to Rabchev's and Nakaoka's resignations from Mercury, i.e., during the time they owed Mercury fiduciary duties. Mercury argues that Infinity was effectively formed before the date it was incorporated based on the evidence, for example, that Rabtcheva's calendar for July 20, 2003 showed cell phone numbers for the new company. But Infinity did not legally exist until it was incorporated. (Corp. Code, § 200, subd. (c) ["The corporate existence begins upon the filing of the articles and continues perpetually"].) "A corporation which does not exist does not have any capacity of any kind. [Citation.] It is elementary that the corporate entity and the natural persons who compose the corporation are not the same. The corporation is an entity separate and distinct from the component persons even though under exceptional circumstances the corporation may be disregarded when it is only the double or *alter ego* of the persons composing it." (*Judelson v. American Metal Bearing Co.* (1948) 89 Cal.App.2d 256, 262.) Mercury did not seek to hold Infinity liable on the basis that it was an alter ego of appellants. Thus, for this additional reason, Infinity could not be liable for conspiracy to breach fiduciary duties owed by Rabchev and Nakaoka to Mercury. The judgment against Infinity must therefore be reversed.

V. THE AWARD OF DAMAGES MUST BE REVERSED.

Appellants contend that even if we find there was substantial evidence to support the finding of breach of fiduciary duty, the judgment must still be reversed because Mercury failed to present substantial evidence of damages it suffered as a result of the breach of fiduciary duty by Rabchev and Nakaoka.

As noted above, the only evidence in support of the breach of fiduciary duty claim concerned Rabchev's and Nakaoka's preresignation solicitation of Mercury's customers and employees. Thus, Mercury's damages could only be based on the harm Mercury suffered as a result of that conduct. At trial, Mercury sought to recover damages in the form of lost profits. Mercury presented the testimony of its expert, Dr. Barbara Luna, who testified that her damages analysis was based on lost sales over a four-year period starting in August 2003 from 11 customers that Mercury had identified "as being affected by the loss of trade secrets and the taking of customers." She arrived at a lost profit figure of $18,278,000, to which she added lost opportunity interest of $3,010,000, for a total of $21,288,000. Mercury admits it cannot be determined how the jury arrived at the reduced amount of $16,457,866.

There are two problems with the damage analysis presented to the jury. First, the trial court dismissed Mercury's claims for misappropriation of trade secrets and interference with economic advantage when it granted the motion for nonsuit that was made after Dr. Luna testified. As such, Mercury was not entitled to recover damages based on "the loss of trade secrets." But Dr. Luna's analysis drew no distinction between damages resulting from a loss of trade secrets and damages resulting from lost customers or any other reason. To the extent the jury may have awarded Mercury damages for lost profits as the result of misappropriation of trade secrets, such damages were not recoverable.

Second, with respect to the "taking of customers," there was nothing unlawful about Rabchev and Nakaoka competing with Mercury *after* they resigned their positions with Mercury and no longer owed it any fiduciary duties. Mercury did not sue them for unfair competition. Thus, Mercury would not be entitled to damages for customers

solicited postresignation. Because we have found there is substantial evidence from which the jury could infer that Rabchev and Nakaoka breached their fiduciary duties to Mercury by soliciting customers of Mercury prior to their resignations, Mercury would be entitled to damages for the profits lost as a result of such breach. But once again, Dr. Luna's analysis drew no distinction between customers who were solicited prior to Rabchev's and Nakaoka's resignations from Mercury and those who were solicited after their resignations. Nor can we tell from the record before us what amount of lost profits were assigned to any of the 11 customers that comprised Dr. Luna's analysis. Accordingly, the matter must be remanded for a determination of the amount of compensatory damages, if any, that resulted from Rabchev's and Nakaoka's preresignation solicitation of customers.

The parties do not discuss on appeal the award of punitive damages. But we note that punitive damages must bear a reasonable relation to the damage actually suffered. (*Gagnon v. Continental Casualty Co.* (1989) 211 Cal.App.3d 1598, 1602.) Since the amount of actual damages must be retried, the issue of punitive damages must also be retried as the amount of punitive damages must be appropriate in light of the compensatory award.

We note, however, that remand of the matter would not include a retrial as to damages suffered by Mercury as a result of Rabchev's and Nakaoka's preresignation solicitation of employees. As appellants correctly point out, Mercury presented no evidence of damages it suffered as a result of Rabchev's and Nakaoka's preresignation solicitation of Mercury employees resulting in their mass exodus. The court in *GAB, supra,* 83 Cal.App.4th at page 426, set forth the type of evidence to be presented in this regard: "GAB presented evidence of myriad expenses it incurred as a result of the departure of the 17 employees. These expenses included the cost of recruiting and interviewing candidates for the positions the 17 employees vacated. . . . GAB also experienced reputational injury from the sudden departure of such a large group of key employees. Finally, GAB had an expert testify on various theories of lost profits resulting from the employee exodus." No such evidence was produced by Mercury.

Indeed, when appellants' counsel stated to the court after Dr. Luna's testimony during the discussion on the motion for nonsuit that Mercury had tailored its case and evidence to the trade secrets claim, Mercury's counsel asked for a moment to confer and then stated "on the damage issue, we wouldn't have anything else to present." Because Mercury had a full and fair opportunity to present its case for damages, it does not get another bite at the apple on retrial on the issue of damages for preresignation solicitation of employees. (*Kelly v. Haag* (2006) 145 Cal.App.4th 910, 919–920.)

DISPOSITION

The judgment is affirmed to the extent it establishes liability against Rabchev and Nakaoka for breach of fiduciary duty. The judgment is reversed as to Infinity. The judgment is also reversed as to damages, and the matter is remanded for a new trial on the issue of compensatory and punitive damages. The parties to bear their own costs on appeal.

NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS.

_____, J.

DOI TODD

We concur:

_____, P. J.

BOREN

_____, J.

CHAVEZ